

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION**

In re:

BKY 99-43563

*Sidney G. Rood, and
Kimberly J. Rood,*

Debtor.

MOTION TO VACATE
DISCHARGE OF DEBTOR

1. Jasmine Z. Keller, Standing Chapter 13 Trustee (the "Trustee"), by and through the undersigned counsel, moves the court for the relief requested below.

2. A hearing on this motion will be held before the Honorable Judge Robert J. Kressel in Courtroom 8 West, U.S. Courthouse, 300 South 4th Street, Minneapolis, Minnesota, at 9:30 a.m. on November 3, 2004, or as soon thereafter as counsel may be heard.

3. Because this motion is being served by mail more than 24 days prior to the hearing date, any response to this motion must be filed and delivered not later than October 27, 2004, which is seven (7) days before the date set for the hearing on the motion (including Saturdays, Sundays, and holidays), or filed and served by mail not later than October 22, 2004, which is ten (10) days before the date set for the hearing (including Saturdays, Sundays, and holidays). UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.

4. This court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334, FED. R. BANKR. P. 5005, and LOCAL RULE 1070-1. The proceeding is a core proceeding. The petition commencing this chapter 13 case was filed on July 1, 1999.

5. The Trustee moves for an order vacating the Discharge of Chapter 13 Debtor dated August 20, 2004. This request is made pursuant to FED. R. BANKR. P. 9024, incorporating FED. R. CIV. P. 60.

6. In addition to their regular monthly payments to the Trustee, the debtors were required to pay to the Trustee "any net income derived from rental or farming activity on the debtor's [sic] farm land" according to the terms of their confirmed Chapter 13 plan, as modified.

7. The debtor sought to pay his plan off prior to the end of the 58-month plan term and he was given a payoff figure from the Trustee. The debtor paid this amount to the Trustee.

8. As the debtors neared the end of their 60-month plan, an audit revealed that the debtors had never informed the Trustee as to their farming-related income, nor had they ever paid in any sums of money beyond their basic \$625/mo. plan payments.

9. On July 20, 2004, the Trustee's undersigned counsel sent a letter to the debtors and their attorney, requesting copies of their federal income tax returns and all supporting schedules for the years 1999 through 2003, in an effort to determine whether the debtors had fully complied with their obligations under their confirmed Chapter 13 plan. The letter specifically stated that the debtors' case could not be processed for discharge until the farming or farm rental income issue had been resolved. A copy of the letter of July 20, 2004 is attached hereto and incorporated by reference herein.

10. Inadvertently, the debtors' case was processed for discharge even though they had never responded to the request for copies of tax returns.

11. The Trustee's undersigned counsel contacted debtors' counsel to advise of the error in entering the discharge and to renew the request for the tax returns. Although debtors' counsel purportedly has contacted the debtors to request that they comply with the Trustee's demand for copies of tax returns, the debtors have failed and refused to provide the requested tax returns, to date.

12. The discharge was entered in this case by mistake, inadvertence or excusable neglect, in that it was an oversight on the part of the Trustee's staff to process the discharge before the issue of whether the debtors owed additional funds for net farm income or rental income had been resolved.

WHEREFORE, the Trustee requests an order as follows:

- A. Vacating the Court's order of discharge dated August 20, 2004; and
- B. Granting any other relief the Court deems equitable and just.

Dated: October 1, 2004

Jasmine Z. Keller, Trustee

/e/ Thomas E. Johnson
Thomas E. Johnson, #52000
Margaret H. Culp, #180609
Attorneys for the Chapter 13 Trustee
310 Plymouth Building
12 South Sixth Street
Minneapolis, MN 55402
612-338-7591

VERIFICATION

I, Thomas E. Johnson, employed by Jasmine Z. Keller, Chapter 13 Trustee, declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge.

Dated: October 1, 2004

/e/ Thomas E. Johnson

Jasmine Z. Keller
Standing Chapter 13 Trustee
District of Minnesota
12 S 6th Street
Plymouth Building ♦ Suite 310
Minneapolis Minnesota 55402-1582
Phone (612) 338-7591 ♦ Fax (612) 338-4529

Counsel
Thomas E. Johnson
Margaret H. Culp

Office Manager
Jane Coldren
Comptroller
Kimberly K. Videen

July 20, 2004

Sidney and Kimberly Rood
9501 County Rd. 40 NW
Pennock, MN 56279

Re: BKY 99-43563

Dear Mr. and Mrs. Rood:

You have made what purports to be a final payment on your Chapter 13 case. However, your confirmed Chapter 13 plan also required you to pay the Trustee "any net income derived from rental or farming activity on the debtor's [sic] farm land," in addition to your regular monthly plan payments. Before a final report and recommendation for discharge can be filed in your case, we must determine if you have complied with this requirement.

I see no evidence in the file to indicate that you have reported to our office your farm income – or the lack of it – for any of the years in which you have been in Chapter 13. At this late stage of the game, perhaps the best way to proceed would be for you to forward to me copies of your federal income tax returns and all supporting schedules for the years 1999 through 2003, inclusive. Your tax returns should disclose farm related income and expenses. If you have other pertinent information to bring to bear on this issue, please include it as well.

Please understand that your case cannot be processed for you to receive your discharge until we have verified that all of the terms and conditions of your plan have been complied with. Please contact your attorney if you need legal advice. Thank you for your cooperation.

Very truly yours,

Thomas E. Johnson
Counsel

Cc: Robert L. Kalenda, Esq.

**UNITED STATES BANKRUPTCY COURT
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Kimberly J. Rood,*

MEMORANDUM OF FACTS AND LAW

Debtor.

FACTS

The Trustee relies upon the facts set forth in the verified motion which, for the sake of brevity, will not be repeated here.

LEGAL DISCUSSION

Bankruptcy Rule 9024 states that Rule 60 of the Federal Rules of Civil Procedure applies to cases under the Bankruptcy Code, with exceptions not relevant here. Under FRCP 60(b):

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect. . . . The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Fed. R. Civ. Pr. 60(b).

The decision whether to grant relief under Rule 60 is discretionary with the court. *In re Staff Investment Co.*, 146 B.R. 256 (Bankr. E.D. Cal. 1992). In *In re Cisneros*, 994 F.2d 1462 (9th Cir. 1993), for example, the Ninth Circuit Court of Appeals affirmed the decision of the Bankruptcy Appellate Panel, affirming the Bankruptcy Court's order granting the motion of the United States to reopen the debtors' Chapter 13 case and vacate the order of discharge on the grounds of mistake. The appellate court was not persuaded by the debtors' argument that 11 U.S.C. § 1328(e) – which requires a finding of fraud on the part of the debtor – provided the sole authority for the bankruptcy court to revoke a discharge order. The Court noted:

[T]he debtors have suggested no reason to believe that Congress intended section 1328(e) to prevent the bankruptcy court from correcting its own mistakes. That this section specifies that a discharge may be revoked “only” for fraud may be explained, we think, as a means of emphasizing that other grounds for revocation – whether general equitable principles or some reason set forth in section 727(d), which governs revocation of a discharge granted in a Chapter 7 proceeding – are not to be imported into the Chapter 13 context.

994 F.2d at 1466.

The Ninth Circuit panel also rejected the argument that, because the mistake was attributable to the trustee, rather than to the bankruptcy court itself, there was no basis for the court to act under Rule 60(b):

We acknowledge that the problems that have arisen in this case are ultimately attributable to the failure of the Trustee to learn that the IRS had filed a proof of claim. For present purposes, however, this is immaterial. The order of discharge was entered by the bankruptcy court under a misapprehension as to the facts of the case. Had the court been apprised of the actual facts, it would never have entered the order. This is precisely the sort of “mistake” or “inadvertence” that Rule 60(b) was intended to reach.

Id.

In a similar vein, Judge Mixon granted a motion by a creditor to revoke a Chapter 13 discharge, in a case where the creditor’s claim had not been paid in full due to the trustee’s misapplication of plan payments. *In re Smith*, 142 B.R. 862 (Bankr. E.D. Ark. 1992).

The Trustee contends that the present motion was filed within a reasonable time after learning of the error. The Trustee has made attempts to resolve the problem without the need to go through this extraordinary motion, but the debtors have failed and refused to voluntarily turn over to the Trustee the requested 5 years of tax returns. There is no real prejudice to the debtors here, for, as noted by the *Cisneros* court:

[T]he Debtors have not demonstrated that they will suffer any undue prejudice from having their inadvertently granted discharge taken away. They are still entitled to earn their discharge by making all the payments required under their confirmed Chapter 13 plan.
994 F.2d at 1467, fn. 3.

In the course of administering approximately 7,000 active Chapter 13 cases, it is inevitable that the Trustee’s office will make mistakes. The Trustee attempts to resolve such problems promptly and informally, when they occur, but will seek relief from the court in a proper case, such as this one, where the informal attempts to resolve it are unavailing.

CONCLUSION

For the reasons stated herein, the Trustee’s motion should be granted and the order discharging the debtors should be vacated.

Dated: October 1, 2004

/e/ Thomas E. Johnson
Thomas E. Johnson, ID # 52000
Margaret H. Culp, ID # 180609
Attorneys for Chapter 13 Trustee
12 South 6th Street, Suite 310
Minneapolis, MN 55402
(612) 338-7591

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UNSWORN DECLARATION FOR PROOF OF
SERVICE

Debtor.

The undersigned, an employee of Jasmine Z. Keller, Standing Chapter 13 Trustee, declares that on October 1, 2004, he served the following:

1. Motion to Vacate Discharge of Debtor;
2. Memorandum of Facts and Law
3. Proposed order; and
4. Unsworn Declaration for Proof of Service

on each of the entities named below, by U.S. mail (unless otherwise indicated) by mailing to each of them a copy thereof by enclosing the same in an envelope with first class postage prepaid and depositing the same in the post office at Minneapolis, Minnesota, addressed to each of them as follows:

Sidney G. Rood
Kimberly J. Rood
9551 County Road 40 NW
Pennock, MN 56279

Robert L. Kalenda, Esq.
Attorney at Law
919 W. St. Germain, Suite 2000
St. Cloud, MN 56301

Fleet Bank (R) NA
c/o Max Flow Corp.
PO Box 2434
Carol Stream, IL 60132-2434

Craig T. Dokken, Esq.
2350 One Financial Plaza
120 South 6th Street
Minneapolis, MN 55402

U.S. Trustee (by e-mail)
1015 U.S. Courthouse
300 South Fourth St.
Minneapolis, MN 55415

I declare under penalty of perjury that the foregoing is true and correct.

Dated: October 1, 2004

/e/ Thomas E. Johnson
Thomas E. Johnson

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION**

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Debtor.

ORDER VACATING DISCHARGE OF
DEBTORS

At Minneapolis, Minnesota _____.

This matter came before the Court on the Chapter 13 Trustee's Motion to Vacate Order of Discharge. Based on the file, the proceedings, and record herein,

IT IS ORDERED:

1. The order discharging the debtors, dated August 20, 2004, is VACATED and this case is reinstated.

Robert J. Kressel
United States Bankruptcy Judge